STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2003
v	No. 235544 Monroe Circuit Court
CHARLES T. SMITH, Defendant-Appellant.	LC No. 00-030806-FH

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree fleeing and eluding a police officer, MCL 750.479a(2), resisting and obstructing a police officer, MCL 750.479, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession of marijuana, MCL 333.7403(2)(d). He was sentenced, as a second habitual offender, MCL 769.10, to concurrent sentences of two to three years' imprisonment for the fourth-degree fleeing and eluding a police officer conviction, two to three years' imprisonment for the resisting and obstructing a police officer conviction, four to six years' imprisonment for the possession of cocaine conviction, and one year imprisonment for the possession of marijuana conviction (second offense double penalty), MCL 333. 7413. Defendant now appeals as of right. We affirm defendant's convictions, vacate his sentences except the sentence for marijuana possession, and remand for resentencing.

I.

On appeal, defendant's first claims that prosecutorial misconduct denied him a fair trial. Specifically, defendant claims that the prosecutor committed misconduct by eliciting bad acts testimony from Kimberley Spohr that defendant was her "dealer" and by eliciting from defendant that he was wanted for escape and absconding from the Department of Corrections. Because defendant did not object below, we review his claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only where the plain error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*. "No error requiring reversal will be found if the prejudicial effect of prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Even assuming for the sake of argument that the challenged testimony amounted to other acts evidence under MRE 404(b), defendant cannot show that the testimony in question was admitted for an improper purpose or that its probative value was substantially outweighed by any prejudicial effect. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993); *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001). As for Spohr's testimony that she leased a car for defendant in exchange for crack cocaine and that defendant was her dealer, defendant has failed to show plain error because the testimony was properly admitted to show that defendant had an opportunity to gain possession of the vehicle. *Carines, supra*, 460 Mich at 764-765 (1999). Furthermore, any prejudice that might have occurred could have been eliminated had a curative instruction been given following a timely objection. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Moreover, Spohr's reference to defendant as a drug dealer, when viewed in conjunction with defendant's own testimony that he had been previously convicted of delivering cocaine, was not so prejudicial that it affected defendants substantial rights, i.e., that it affected the outcome of the trial. *Carines, supra*, 460 Mich at 763-764.

Defendant also cannot show plain error when the prosecutor elicited testimony from defendant during cross-examination that he was wanted for escape or absconding. The prosecutor's questioning was in response to defendant's testimony given in direct examination that he had not been arrested or in trouble with the law since 1996. There was no prosecutorial misconduct because defendant opened the door to the prosecutor's questioning him in this regard. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993).

II.

Next, contrary to defendant's contention, he was not denied the effective assistance of counsel. Because defendant did not move for a new trial or seek an evidentiary hearing before the trial court, we review the issue on the basis of the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant." *People v Pickens*, 446 Mich 298, 329; 521 NW2d 797(1994). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Here, defendant cannot show that his trial counsel was ineffective when he did not object to Spohr's testimony that defendant was her drug dealer. Even assuming that trial counsel's failure to object constituted error, defendant cannot show that he was prejudiced. Defendant also cannot show that counsel committed error by failing to object to the prosecution's questioning

defendant about whether he was wanted for escape or absconding. As we already concluded, the prosecutor did not improperly cross-examine defendant in this respect. Thus, any objection by defense counsel for exclusion of this evidence would have been meritless. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001) ("A trial attorney need not register a meritless objection to act effectively.") Nor was trial counsel ineffective when he elicited testimony from defendant that he was a convicted drug dealer. Given that defendant was charged with possession of a weapon by a felon, MCL 224f,[1] it was sound trial strategy for trial counsel to front defendant's prior drug conviction before the prosecution introduced it into evidence. See *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). Finally, trial counsel was not ineffective when he failed to have the trial court read a cautionary instruction to the jury concerning uncharged criminal acts. Counsel was not ineffective because his decision not to request a cautionary instruction was a matter of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

III.

Next, defendant claims that the trial court erred in denying his suppression motion. "In considering a motion to suppress evidence, this Court reviews a trial court's factual findings to determine if they are clearly erroneous and reviews a trial court's conclusions of law de novo." *Snider*, *supra*, 239 Mich App at 406; MCR 2.613(C).

The failure to preserve evidence potentially useful to a defendant raises due process concerns. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Where evidence is not produced, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *Id*. This Court has uniformly held that, "[a]bsent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Failure to preserve evidentiary material that may have exonerated a defendant will not constitute a denial of due process unless bad faith on the part of the police is shown. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). "Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Johnson*, *supra*, 197 Mich App at 365.

In this case, the trial court did not err in finding that there was no bad faith on the part of the police department in returning the car to the leasing company prior to any request by defendant. Specifically, Detective Vandercook of the Monroe County Sheriff's Department testified that the police department in no way tried to hinder defendant, and that when the Taurus was returned, there was no evidence of value left in it. After determining that a leasing company owned the car, Detective Vandercook contacted both the leasing company and Spohr, who had leased the vehicle. Spohr informed Detective Vandercook that she wanted nothing to do with the vehicle. Further, it was the policy of the Monroe County Sheriff's Department to return vehicles

[1] The jury found defendant not guilty of this charge.

to any owner as soon as possible. Under the circumstances, defendant cannot show that the police or the prosecution acted in bad faith or intentionally suppressed or destroyed evidence. Accordingly, the trial court did not err in its denial of defendant's motion to suppress.

IV.

Finally, defendant argues that he is entitled to resentencing because the trial court misinterpreted the law by upwardly departing from the sentencing guidelines without applying the substantial and compelling standard and without adequately articulating specific reasons for departure. We agree.

Because the offenses with which defendant was charged occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). With the enactment of the new sentencing guidelines, the Legislature developed legislative guidelines for habitual offender sentences. MCL 769.34; *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). A court may depart from the legislative guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3). *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 137 (2001). A court may not depart from the legislative sentencing guidelines based on certain specified factors, including gender, race, ethnicity, national origin, and lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

In reviewing a departure from the legislative guidelines range, the existence of a particular factor is a factual determination this Court reviews for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *Babcock, supra*, 244 Mich App at 75-78.

Defendant was sentenced to two to three years' imprisonment for fourth-degree fleeing and eluding a police officer, two to three years' imprisonment for resisting and obstructing a police officer, and four to six years' imprisonment for possession of cocaine, which were enhanced due to defendant's second habitual offender status, MCL 769.10. Defendant's fourth-degree fleeing and eluding a police officer conviction, resisting and obstructing a police officer conviction, and possession of cocaine conviction were each assessed a total offense variable score of fifteen and a prior record variable score of seventy. Under the legislative guidelines, the recommended minimum sentence range for each of these three convictions was between two and twenty-one months' imprisonment. MCL 777.64, MCL 769.10; MCL 750.479a(2); MCL 750.479b; MCL 333.7403(2)(a)(v).

In this case, the trial court departed from the legislative guidelines on the following basis:

> All, right the sentence of this court is as follows, and we have the *Milbourn* case, I believe it is, that says we consider the seriousness of the offense. We look at the prior record, the Court can depart from guidelines scoring, usually, the guidelines take most things into consideration, but the courts can depart if

> there is a reason for departure. I think there is a reason for departure here. I'm inclined to believe Mr. Smith is sincere as he speaks here today, but I must look at his track record, what he does. While he is sincere today, is he going to be sincere if I put him on lifetime probation, and he's back on the street? His track record tells me something about him. People can and do change, but I think we need to look at it. The facts of the tether, removal of device, the things that happened here, a high speed chase is dangerous to everyone, not only to Mr. Smith, life is valuable, but to others who are using the roads, no license. And looking at all the things in *Milbourn*, I believe a departure is called for here, and I'm going to depart from the guidelines, but not a great departure. . . . and I have noted the escape status at the time. I think those are sufficient reasons under *Milbourn*.

Subsequently, the trial court indicated on the departure evaluation form that it departed from the sentencing guidelines range because these offenses were committed while defendant was on escape from the Michigan Department of Corrections, because defendant removed his electronic tether device, and because a high speed chase was involved in which defendant put at risk the safety of the police and public.

As defendant correctly argues, the trial court did not apply the proper standard in departing from the guidelines. To depart from the legislative guidelines, the trial court must identify substantial and compelling reasons. MCL 769.34(3); *Hegwood*, *supra*, 465 Mich at 440. While the trial court correctly noted that principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1988) may still be considered in determining the extent of the departure, see *Hegwood*, s*upra*, 465 Mich at 436 n 10, citing *Milbourn*, *supra*, 435 Mich 651,[2] the trial court never alluded to the "substantial and compelling" standard or the legislative guidelines in departing. It is the responsibility of a circuit court to impose a sentence, but only within the limits set by the Legislature. *Hegwood*, *supra*, 465 Mich at 437.

Because the trial court did not apply the proper standard in departing from the appropriate sentence range, we vacate defendant's sentences, except the sentence for marijuana possession, and remand for resentencing. MCL 769.34(11); *Babcock*, *supra*, 244 Mich App at 80. On remand, the trial court is free to impose any minimum sentence within the guidelines range, or to depart from that range if there is a substantial and compelling reason to do so and such reason is stated on the record. *Id.*

Contrary to defendant's contention, however, we do not believe that resentencing should occur before a different judge. In this particular case, the trial court's error appears to result merely from an incorrect understanding of the new sentencing guidelines, not from prejudice or an improper attitude toward defendant. *Hegwood*, *supra*, 465 Mich at 440-441, n 17. Therefore, no reason exists to assign a different judge to conduct the resentencing. *Id*. Finally, because we vacate three of defendant's sentences and remand for resentencing, we need not address defendant's claim that these sentences were disproportionate and constituted cruel and unusual punishment.

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[2] We note that the trial court sentenced defendant on June 29, 2001, which was before the Michigan Supreme Court issued *Hegwood*.

We affirm defendant's convictions, vacate his sentences, except the sentence for marijuana possession, and remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage